

# REGULATION

<b>SPDOC No.:</b>  05-07	<b>Effective Date:</b>  May 22, 2005	<b>Index Reference:</b>  Military Leave of Absence	<b>Regulation Number:</b>  <b>2.04</b>
<b>Issuing Bureau:</b>  Executive	<b>Rule Reference:</b> Rule: 2-14 (Rights of Employees Absent Due to Service in the Uniformed Services)		<b>Replaces:</b>  New
<b>Subject:</b> <b>MILITARY LEAVES OF ABSENCE AND RETURN TO WORK: BASIC RIGHTS</b>			

## TABLE OF CONTENTS

<b>1. PURPOSE.....</b>	<b>1</b>
<b>2. CIVIL SERVICE COMMISSION RULE REFERENCE .....</b>	<b>2</b>
<b>3. DEFINITIONS .....</b>	<b>3</b>
<b>4. STANDARDS.....</b>	<b>4</b>
A. Military Leaves of Absence.....	4
B. Requirements for Returning to Work and Other Benefits. ....	5
C. Time Limits for Returning to Work. ....	8
D. Rights, Benefits, and Obligations. ....	9
E. Position on Returning to Work.....	10
F. Prohibited Discrimination and Retaliation. ....	12
G. Termination of Entitlements.....	12
H. State National Guard Duty.....	13
I. Discharge for Just Cause. ....	13
J. Enforcement of Employment and Return-to-Work Rights.....	13

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## **1. PURPOSE**

This regulation establishes the basic employment and return-to-work rights and benefits for classified employees who are absent due to service in the uniformed services.

## 2. **CIVIL SERVICE COMMISSION RULE REFERENCE**

### ***Rule 2-14 Rights of Employees Absent Due to Service in the Uniformed Services***

#### ***2-14.1 Basic Employment and Return-to-work Rights and Benefits***

- (a) **Regulations.** *The state personnel director shall issue regulations to provide employment and return-to-work rights and benefits for employees who are absent from a classified position due to service in the uniformed services. The regulations shall provide rights and benefits that are consistent with rights and benefits provided under applicable federal law, except where this rule provides supplemental or enhanced rights and benefits that exceed the minimum requirements of applicable federal law.*
- (b) **Military leave of absence.** *The regulations shall authorize a military leave of absence for an employee absent from a classified position due to service in the uniformed services, subject to the requirements of the regulation.*
- (c) **Effect on federal rights and benefits.** *The civil service rules and regulations shall not be applied or interpreted to limit, reduce, or eliminate any right or benefit under applicable federal law.*
- (d) **Character of rights and benefits in the rules and regulations.** *The rights and benefits granted in this rule and the regulations are granted solely under the authority of the civil service commission and the state personnel director and are not rights or benefits under federal law.*

\* \* \*

#### ***2-14.7 Enforcement***

##### ***(a) Complaints.***

- (1) **Grievance.** *Except as provided in subsection (a)(2), an employee who is entitled under this rule or the regulations to return-to-work rights or benefits and who claims that an appointing authority has failed or refused, or is about to fail or refuse, to comply with the provisions of this rule or the regulations, may file a grievance and grievance appeal as authorized in the rules and applicable regulations.*
- (2) **Technical complaint.** *A person, whether or not a classified employee, who is entitled to employment or return-to-work rights or benefits under the regulations and has a complaint regarding a technical decision may file a technical complaint as authorized in the rules and the regulations.*

- (b) **Stay of proceedings.** *A grievance or technical complaint under this rule or the regulations concerning employment or return-to-work rights or benefits due to service in the uniformed services is automatically stayed if any of the following proceedings are initiated under applicable federal law concerning any of the same period of service in the uniformed services alleged in the grievance or technical complaint.*
- (1) *An investigation by the United States Secretary of Labor in response to a complaint filed by the employee.*
  - (2) *A state or federal civil action filed by the employee against the State of Michigan or any of its departments, boards, or commissions.*
  - (3) *A state or federal civil action filed by the United States on behalf of the employee against the State of Michigan or any of its departments, boards, or commissions.*
- (c) **Summary dismissal of grievance.** *If an employee receives a final judgment on a claim in a civil action brought against the State of Michigan or any of its departments, boards, or commissions under applicable federal law concerning employment or return-to-work rights or benefits due to service in the uniformed services, a grievance or technical complaint under this rule or the regulations by the employee regarding any of the same period of service in the uniformed services may be summarily dismissed in whole or in part on the basis of claim preclusion or issue preclusion, as appropriate.*
- (d) **No waiver.** *This rule does not constitute a waiver of the sovereign immunity of the State of Michigan under the United States Constitution.*

### 3. **DEFINITIONS**

#### **A. Civil Service Commission Rule Definitions**

1. **Seniority** *means longevity in employment together with any benefits of employment which accrue with, or are determined by, longevity in employment.*
2. **Service in the uniformed services** *means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time national guard duty, a period for which an employee is absent from employment for the purpose of an examination to determine the fitness of the employee to perform any such duty, and a period for which an employee is absent from employment for the purpose of performing funeral honors duty as authorized under applicable federal law [10 USC §12503 or 32 USC §115].*

3. ***Uniformed services*** means all of the following:

- (a) *The armed forces of the United States, including the army, navy, marine corps, air force, coast guard, army reserve, naval reserve, marine corps reserve, air force reserve, and coast guard reserve.*
- (b) *The army national guard and the air national guard when engaged in federal or state active duty for training, inactive duty training, or full-time national guard duty.*
- (c) *The commissioned corps of the public health service.*
- (d) *Any other category of persons designated by the president in time of war or national emergency.*

**B. Additional Definitions as used in this Regulation**

- 1. ***Decompression time*** means the period beginning on the date an employee on military leave is discharged from active duty in a uniformed service and ending on the date the employee returns to work in the classified service.
- 2. ***Service-connected disability*** means a disability resulting from an illness or injury incurred in, or aggravated during, service in a uniformed service.

**4. STANDARDS**

**A. Military Leaves of Absence.**

- 1. **Eligibility for military leave of absence.** If an employee is absent from a classified position due to service in the uniformed services, an appointing authority shall place the employee on a military leave of absence if both of the following criteria are satisfied:
  - a. **Notice.** The employee or an appropriate officer of the uniformed service gives the appointing authority advance oral or written notice that the employee will be absent due to service in a uniformed service. This requirement is waived if notice is prevented by military necessity or is otherwise impossible or unreasonable under all of the circumstances.
  - b. **Five year limit.** The cumulative length of the employee's previous absences from the employing department due to service in the uniformed services does not exceed 5 years. The exclusions in standard B(2) do not count toward the 5-year limit.

2. **Deemed to be on a military leave.** If an employee is absent from a classified position due to service in the uniformed services but has not been placed on a military leave of absence, the employee is nonetheless deemed to be on a military leave of absence if the employee is qualified under rule 2-14 and this regulation. If an employee is deemed to be on a military leave of absence, the employee is entitled to all rights and benefits as though the employee had been granted a military leave of absence.
3. **Applicable rules and regulations.** A military leave of absence is governed exclusively by rule 2-14 and this regulation. Rule 2-11 [Leave of Absence with Pay] and rule 2-12 [Leave of Absence without Pay] do not apply to a military leave of absence. An appointing authority shall not grant any other paid or unpaid leave of absence, right, or benefit to an employee absent due to service in a uniformed service except as expressly authorized in the civil service rules and regulations.
4. **Unpaid leave.** Unless otherwise expressly authorized in the rules or regulations, a military leave of absence is without pay.
5. **Use of accrued leave.** An employee is permitted to use any annual, personal, compensatory, or banked leave time accrued before beginning service in the uniformed services. An appointing authority cannot require an employee to use annual, personal, compensatory, or banked leave time during such period.
6. **Funeral honors duty.** An appointing authority shall grant an employee who is a member of a reserve component a military leave of absence to allow the employee to perform funeral honors duty as authorized by 10 USC § 12503 or 32 USC §115.

**B. Requirements for Returning to Work and Other Benefits.**

1. **Entitlement.** An employee on a military leave of absence is entitled to return to work and to the other rights and benefits of rule 2-14 and this regulation if all of the following occur:
  - a. **Notice.** The employee or an appropriate officer of the uniformed service gave advance written or verbal notice of the service to the employee's appointing authority. This requirement is waived if notice was prevented by military necessity or was otherwise impossible or unreasonable under all of the circumstances.
  - b. **Five year limit.** The cumulative length of the absence and all previous absences from a position with the employee's principal department due to service in the uniformed services

does not exceed 5 years. The exclusions in standard B(2) do not count toward the 5-year limit.

- c. **Return to work.** The employee returns to work or gives written or oral notice of readiness to return to work before the military leave of absence expires.

2. **Five year limit; exclusions.** The following service is not counted toward the 5-year limitation in standards A(1)(b) and B(1)(b):

- a. Service that is required, beyond 5 years, to complete an initial period of obligated service.
- b. Service during which the employee was unable to obtain orders releasing the employee from a period of service in the uniformed services before the expiration of the 5-year period and such inability was through no fault of the employee.
- c. Service performed as required pursuant to 10 USC §10147 32 USC §502(a), 32 USC §503, or to fulfill additional training requirements determined and certified in writing by the Secretary of the uniformed service concerned, to be necessary for professional development, or for completion of skill training or retraining.
- d. Service performed by a member of a uniformed service who is ordered as follows:
  - (1) Ordered to or retained on active duty under 10 USC §688, §12301(a), §12301(g), §12302, §12304, or §12305, or under 14 USC §331, §332, §359, §360, §367, or §712.
  - (2) Ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the Secretary of the uniformed service concerned.
  - (3) Ordered to active duty (other than for training) in support, as determined by the Secretary of the uniformed service concerned, of an operational mission for which personnel have been ordered to active duty under 10 USC §12304.
  - (4) Ordered to active duty in support, as determined by the Secretary of the uniformed service concerned, of a critical mission or requirement of the uniformed services.
  - (5) Called into federal service as a member of the national guard under 10 USC §§331, et seq. or §12406.
- e. Decompression time.

### 3. Documentation for returning to work.

- a. **Required documentation.** An employee returning to work after a period of service in a uniformed service that exceed 30 days shall, upon request, provide documentation to establish each of the following:
  - (1) The employee's return to work is timely under standard C.
  - (2) The employee has not exceeded the 5-year service limitation (subject to the exclusions in standard B(2)).
  - (3) The employee's entitlement to the benefits has not been terminated pursuant to standard G.
- b. **Lack of documentation.** The failure of an employee to provide documentation that satisfies standard B(3)(a) is not a basis for denying return to work if the failure occurs because the documentation does not exist or is not readily available at the time of the request of the appointing authority. If, after the employee returns to work, documentation becomes available that establishes that the employee does not meet one or more of the requirements referred to in standard B(3)(a), the appointing authority may terminate the employment of the employee and the provision of any rights or benefits afforded the employee under this regulation.
- c. **Limit on demand for documents.** An appointing authority may not delay an employee's return to work by demanding documentation that does not then exist or is not then readily available.

### 4. Return to work not required; standards. An appointing authority is not required to return an employee to work under this regulation if any of the following occur.

- a. The employer's circumstances have so changed as to make such return to work impossible or unreasonable.
- b. The employee has a service-connected disability and the employee's return to work would impose an undue hardship on the employer.
- c. The state position which the employee left to serve in the uniformed services was for a brief, nonrecurrent period and there is no reasonable expectation that state employment would continue indefinitely or for a significant period. Typically, this includes a non-career position or a limited-term position that was not expected to be renewed.

5. **Timing, frequency, and duration of service not to be considered.** In any determination of an employee's rights to protection under this regulation, the timing, frequency, and duration of the employee's training or service, or the nature of such training or service in the uniformed services (including voluntary service), cannot be a basis for denying protection of this regulation so long as the military service does not exceed the 5-year limit in standard B(2), the employee gave the advance notice required in standard A(1)(a), and the employee gave the return-to-work notice required in standard C.

**C. Time Limits for Returning to Work.**

1. **Time limits for returning to work.** After completion of a period of service in the uniformed services, an employee must report to work or give notice of readiness to return to work with the appointing authority, as follows:
- a. **Less than 31 days' service or fitness exam.** If the period of service was less than 31 days or was for a service fitness examination, the employee must report to work not later than the beginning of the first full regularly scheduled work period on the first full calendar day following:
    - (1) the completion of the period of service (or fitness examination), plus
    - (2) a period allowing for the safe transportation from the place of the service (or examination) to the employee's residence, plus
    - (3) eight hours.If reporting within the required period is impossible or unreasonable through no fault of the employee, then the employee must report as soon as possible after the expiration of the 8-hour period.
  - b. **31 to 180 days' service.** If the period of service was more than 30 days but less than 181 days, the employee must report for work or give notice not later than 14 days after the completion of the period of service. If reporting for work or giving notice within the 14-day period is impossible or unreasonable through no fault of the employee, the employee must report or give notice no later than the first full calendar day when it becomes possible.
  - c. **181 or more days' service.** If the period of service was for more than 180 days, the employee must report for duty or



give notice not later than 6 months after the completion of the period of service.

**2. Time limits extended for medical reasons.**

- a. **Extension of time limits.** An employee who is hospitalized for, or convalescing from, an illness or injury incurred in or aggravated during service in the uniformed services shall, at the end of the period that is necessary for the person to recover from the illness or injury, return to work or give notice of readiness to return to work. Except as provided in standard C(2)(b), the period of recovery may not exceed 2 years.
  - b. **Further extension of period.** The 2-year period in standard C(2)(a) shall be extended by the minimum time required to accommodate the circumstances beyond the employee's control which make reporting or giving notice within the 2-year period impossible or unreasonable.
- 3. No automatic forfeit.** An employee who fails to return to work or give notice of readiness to return to work within the appropriate period specified in this standard C shall not automatically forfeit the employee's entitlement to the rights and benefits provided in rule 2-14 or this regulation but shall be subject to the civil service rules and regulations and the appointing authority's rules, policy, and general practices pertaining to explanations and discipline for absence from scheduled work.

**D. Rights, Benefits, and Obligations.**

An employee who returns to work under this regulation is entitled to the rights and benefits determined by seniority that the employee had on the day the employee began the military leave plus any additional seniority-based rights and benefits that the employee would have attained if the employee's continuous service with the state had not been interrupted by the military leave.

1. **Seniority-based rights.** On returning to work, the following service and work hour counters (if not previously adjusted during the military leave of absence) are adjusted to include an employee's time on a military leave of absence, including any decompression time.
  - a. Continuous service hours.
  - b. Employment preference.
  - c. Eligibility for annual leave accruals.
  - d. Eligibility for severance pay.

- e. Eligibility for longevity payment.
  - f. Eligibility for family and medical leave.
  - g. Eligibility for parental leave.
  - h. Step in a pay range with steps (if in satisfactory status at the beginning of the military leave).
2. **Nonseniority-based rights; examples.** By way of example only, the following are not seniority-based and are not adjusted as a result of an employee's service in the uniformed services:
- a. Eligibility for lump sum or base salary increase (if in a performance pay plan). Performance pay awards are based on evaluations of actual job performance, not on seniority.
  - b. Eligibility for reclassification. Eligibility for reclassification is based on actual job performance, not on seniority.
  - c. Length of a follow-up rating period (rule 2-3.4). A follow-up rating period is suspended during a military leave of absence. When the employee returns to work, the follow-up rating period picks up at the point where the military leave of absence began.
  - d. Length of a probationary period (rule 3-6.2). A probationary period is a part of the merit selection process and is suspended during a military leave of absence. When the employee returns to work, the probationary period picks up at the point where the military leave of absence began, subject to standard.

#### **E. Position on Returning to Work.**

An eligible employee who returns to work after a military leave of absence is returned to work in the classified service as follows:

1. **Less than 91 days' service.** An employee whose period of service in the uniformed services was less than 91 days is returned to work in the position the employee occupied before beginning service in the uniformed services.
2. **More than 90 days' service.** An employee whose period of service in the uniformed services was more than 90 days is returned to work in either (1) the position the employee occupied before beginning service in the uniformed services or (2) a position in the same classification level.
3. **Abolishment of position or RIF**
  - a. If, while an employee is on a military leave of absence, the employee's position is abolished or affected by a reduction in

force (RIF), the employee is treated as though the employee is at work on the day of the abolishment or reduction in force. For example, the employee may be demoted, laid off, placed on recall, or otherwise affected by the application of employment preference in the same manner as if the employee was present.

- b. When the employee returns to work from the military leave of absence, the employee is placed in the same circumstance the employee would have been in if the employee's continuous employment with the state had not been interrupted by a military leave of absence, including, for example, a demotion, layoff, recall, or other personnel action.

#### 4. Effect of disability

- a. **Service-connected disability.** If an employee, due to a service-connected disability, is not qualified to return to work in the position required under standard E(1) or E(2), after reasonable efforts by the appointing authority to accommodate the disability, the employee is returned to work in the following order of priority:
  - (1) In any other position with equivalent seniority, status, and pay, the duties of which the employee is qualified to perform or would become qualified to perform (as determined by the Department of Civil Service) with reasonable efforts by the appointing authority.
  - (2) If the employee cannot be returned to work under subsection (1), then in a position which is the nearest approximation to a position referred to in subsection (1) in terms of seniority, status, and pay, consistent with circumstances of the employee's case.
- b. **Nonservice-connected disability.** If an employee, due to a nonservice-connected disability, is not qualified to return to work in the position required under standard E(1) or E(2) and cannot become qualified with reasonable efforts by the employer, then the employee is returned to work in any other position that the employee is qualified to perform.
- c. **Failure to qualify.** If an employee, due to any disability, is not qualified to return to work in any position after reasonable efforts by the appointing authority to accommodate the disability, the employee is separated.

- d. **Status of employee.** An employee who is discharged from active duty and whose return to work is delayed by a service-connected disability remains on an unpaid military leave of absence until the employee is returned to work or the employee is separated after failing to qualify to return to work.
5. **Ties.** If two or more employees are entitled to return to work to the same position, the employee who left the position first has the prior right to return to that position.

#### **F. Prohibited Discrimination and Retaliation.**

1. **Discrimination.** An appointing authority shall not deny initial employment, retention in employment, promotion, the right to return to work after a military leave of absence, or any benefit of employment to a person who (1) is or applies to be a member of a uniformed service or (2) performs, has performed, applies to perform, or is obligated to perform service in a uniformed service, based on that person's actual or potential membership or service.
2. **Retaliation prohibited.** An appointing authority shall not discriminate in employment against or take any tangible adverse employment action against any person because the person has (1) acted to enforce a protection afforded any person under this rule, (2) testified or otherwise made a statement in connection with any proceeding under this rule, (3) assisted or otherwise participated in an investigation under this rule, or (4) exercised a right provided in this rule. The prohibition in this standard applies with respect to a person regardless of whether that person has performed service in the uniformed services.

#### **G. Termination of Entitlements.**

An employee's entitlement to the benefits under rule 2-14 or this regulation terminates if any of the following occur:

1. The employee is separated from a uniformed service (1) with a dishonorable discharge, (2) with a bad conduct discharge, or (3) under other than honorable conditions, as characterized by regulations of the uniformed service.
2. The employee is a commissioned officer dismissed (1) by sentence of a general court-martial, (2) in commutation of a sentence of general court-martial, or (3) by order of the President in time of war, as permitted under 10 USC §1161(a).
3. The employee is a commissioned officer dropped from the rolls pursuant 10 USC §1161(b), due to (1) absence without authority for at least

3 months, (2) separation by reason of a sentence to confinement adjudged by a court-martial, or (3) a sentence to confinement in a federal or state penitentiary or correctional institution.

4. The employee fails to return to work in the classified service within the appropriate period specified in standard C.

#### **H. State National Guard Duty.**

An employee who is a member of a national guard unit and is ordered to active state duty by the governor or volunteers for such duty is entitled to the employment and return-to-work rights and benefits provided in rule 2-14 and this regulation even if the employee is not entitled to similar rights or benefits under federal law.

#### **I. Discharge for Just Cause.**

Notwithstanding any other rule or regulation that may permit discharge for reasons other than just cause, an employee in an indefinite position who returns to work under this regulation is subject to the following:

1. **31 to 180 days' service.** If the employee's period of service in the uniformed services before returning to work was more than 30 days but less than 181 days, the employee may not be discharged within 180 days after returning to work except for just cause.
2. **More than 180 days' service.** If the employee's period of service in the uniformed services before returning to work was more than 180 days, the employee may not be discharged within one year after returning to work except for just cause.

#### **J. Enforcement of Employment and Return-to-Work Rights.**

1. **Complaints.** As authorized in rule 2-14.7, an employee who is entitled to employment or return-to-work rights or benefits and who claims that an appointing authority has failed or refused, or is about to fail or refuse, to comply with rule 2-14 or this regulation may file a grievance or technical complaint, as appropriate.
2. **Grievance and Grievance Appeal; Procedures and Burdens of Proof.** A grievance or grievance appeal under rule 2-14 and this regulation is conducted as provided in rule 8-1 [Grievances], rule 8-2 [Grievance Appeals], and regulation 8.01 [Grievance and Grievance Appeal Procedures], except that the burden of proof shall be as follows:
  - a. **General.** Except as provided below in standards J(2)(b) through (f), the employee has the burden of proving by a preponderance of the evidence that the appointing authority discriminated against the employee or otherwise failed to

comply with a rule or applicable regulation and, as a result, the employee has suffered or will suffer a tangible adverse employment action.

b. **Discrimination.** In a grievance alleging discrimination under standard F(1):

- (1) The grievant first has the burden of proving by a preponderance of the evidence that one of the following was a motivating factor in the appointing authority's action:
  - (a) The grievant's membership in the uniformed services.
  - (b) The grievant's application for membership in the uniformed services.
  - (c) The grievant's service in the uniformed services.
  - (d) The grievant's application for service in the uniformed services.
  - (e) The grievant's obligation for service in the uniformed services.
- (2) If so, the appointing authority then has the burden of proving by a preponderance of the evidence that the challenged action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service.

c. **Retaliation.** In a grievance alleging retaliation under standard F(2):

- (1) The grievant first has the burden of proving by a preponderance of the evidence that one of the following was a motivating factor in the appointing authority's action.
  - (a) The grievant's action to enforce a protection afforded any person under this regulation.
  - (b) The grievant's testimony or making of a statement in or in connection with any proceeding under this regulation.
  - (c) The grievant's assistance or other participation in an investigation under this regulation.
  - (d) The grievant's exercise of a right provided for in this regulation.
- (2) If so, the appointing authority then has the burden of proving by a preponderance of the evidence that the challenged action would have been taken in the absence of the grievant's

enforcement action, testimony, statement, assistance, participation, or exercise of a right.

- d. **Impossibility of returning to work.** In a grievance involving return to work in which the appointing authority claims under standard B(4)(a) that circumstances have so changed as to make returning to work unreasonable or impossible, the appointing authority has the burden of proving such impossibility or unreasonableness by a preponderance of the evidence.
- e. **Undue hardship.** In a grievance involving return to work in which the appointing authority claims under standard B(4)(b) that a required accommodation, training, or effort is an undue hardship, the appointing authority has the burden of proving such undue hardship by a preponderance of the evidence.
- f. **Brief employment.** In a grievance involving return to work in which the appointing authority claims under standard B(4)(c) that the employment from which the employee left was for a brief, non-recurrent period and there was no reasonable expectation that such employment will continue indefinitely or for a significant period, the appointing authority has the burden of proving by a preponderance of the evidence the brief or non-recurrent nature of the employment and that there was no reasonable expectation of the employment continuing indefinitely or for a significant period.

## **CONTACT**

Questions regarding this regulation may be addressed to the Department of Civil Service, Office of the General Counsel, P.O. Box 30002, 400 S. Pine Street, Lansing, Michigan 48909; telephone (517) 373-9557; or e-mail [McLellanD@Michigan.gov](mailto:McLellanD@Michigan.gov).

**NOTE:** Regulations are issued by the State Personnel Director, under authority granted in the *State of Michigan Constitution* and the *Michigan Civil Service Commission Rules*. Regulations that implement Commission Rules are subordinate to those Rules.